

MONTANA FIFTH JUDICIAL DISTRICT COURT, BEAVERHEAD COUNTY

IN THE MATTER OF COURT)
 CONFIRMATION AND APPROVAL)
 OF THE CONTRACT BETWEEN THE)
 UNITED STATES OF AMERICAN AND)
 THE CLARK CANYON WATER)
 SUPPLY CO.)

Cause No. DV-06-12986

EAST BENCH IRRIGATION DISTRICT)

**ORDER REGARDING
 PLAINTIFF'S MOTION
 TO DISMISS**

Plaintiff,)

Client _____

vs.)

File No. 93083-001

OPEN A RANCH, INC., a Montana)
 Corporation,)

Subfile _____

Defendants.)

Date REC'D APR 30 2007

In 1958 East Bench Irrigation District ("EBID") entered into a contract with the United States. It provided that the United States would supply water for EBID lands and would construct, operate and maintain water distribution and drainage facilities. EBID would repay the costs of construction, operation and maintenance of those facilities. Part A of the 1958 contract generally involves the supply of water for EBID. Part A of the 1958 contract expired December 31, 2006. EBID negotiated and entered into a new contract with the United States.

1 EBID filed a petition for Court approval of the contract. Open A opposes the petition
2 and has filed six counterclaims against EBID. EBID moved to dismiss Open A's
3 counterclaims pursuant to Rule 12(b)(1) and 12(b)(6) M.R.Civ.P. Open A responded. EBID
4 replied.
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6 **RULE 12(b)(6)**

7 EBID moved to dismiss for "failure to state a claim upon which relief can be
8 granted." Rule 12(b)(6) M.R.Civ.P. "A motion to dismiss under Rule 12(b) (6), M.R.Civ.P.,
9 has the effect of admitting all well-plead allegations in the complaint. In considering the
10 motion, the complaint is construed in the light most favorable to the plaintiff, and allegations
11 of fact contained therein are taken as true." *Hauschulz v. Michael Law Firm*, 306 Mont. 102,
12 103, 30 P.3d 357, 359 (2001). Furthermore, "[a] complaint should not be dismissed for
13 failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of
14 facts in support of his claim which would entitle him to relief." *Id.*
15

16 Court confirmation of a contract EBID entered in to with the United States is
17 controlled by Section 85-7-1957(a) M.C.A. It provides that:
18

19 The board of commissioners of any irrigation district, before the making of
20 any contract with the United States hereunder, shall commence a special
21 proceeding in the district court of the state, by which the proceedings of the
22 board and of the district leading up to the making of any such contract and the
23 validity of the terms thereof shall be judicially examined and approved and
24 affirmed or disapproved and disaffirmed.

25 Therefore, in this proceeding the Court must examine: (1) the proceedings of the
26 board and of the district before leading up to the making of the contract and (2) the validity
27 of the terms of the contract. The parties agree that the Court must determine the "validity of
28 the terms of the contract". However, they have argued extensively about the meaning of the
phrase.

1 EBID argues that the Court should examine the validity of the contract only to the
2 extent that the contract creates a binding and enforceable agreement between EBID and the
3 United States. *See e.g., EBID's Reply to Motion to Dismiss* pg. 3.

4
5 The only Montana case cited by EBID is *In re: Fort Shaw Irrigation District*, 81
6 Mont. 170, 261 P. 962 (1927). However, *Fort Shaw* was decided before enactment of Section
7 85-7-1957 M.C.A. EBID concedes that "the *Fort Shaw* decision preceded the enactment of
8 [Section] 85-7-1957, MCA, with its particular language requiring the court to confirm the
9 validity of the terms of the contract... ." *Id.* at 10. This proceeding is controlled by Section
10 85-7-1957. Accordingly, *Fort Shaw* is not persuasive.

11
12 EBID argues "that *Fort Shaw* is still applicable because [of] [EBID's] interpretation
13 of the phrase 'validity of the terms thereof' i.e., that all elements of a contract are present and
14 the contracts have legal force and are binding on the parties thereto." *Id.* at 10. This
15 argument is confusing. EBID has not demonstrated *Fort Shaw's* continued relevance. *Fort*
16 *Shaw* does not assist EBID.

17
18 EBID has cited many cases from other jurisdictions in support of its argument.
19 *Application of Frenchman Valley Irrigation District*, 167 Neb. 78, 91 N.W.2d 415 (1958), is
20 particularly instructive because Nebraska's contract confirmation statute is nearly identical to
21 Section 85-7-1957 M.C.A. *See e.g., R.R.S. Neb. § 46-1-151, Frenchman*, 167 Neb. at 95.

22 In *Frenchman* the trial court affirmed the contract except for provisions 16, 17 and
23 18. *Id.* at 84. Thus, the trial court in *Frenchman* examined at least 18 provisions of the
24 contract. The appellate court reversed. The appellate court did not reason that the trial court
25 erred for examining the 18 contract provisions. Rather the appellate court reasoned that the
26 legal analysis regarding provisions 16, 17 and 18 was incorrect. *Id.* at 118. Nebraska courts
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1 conduct a broad review of the contract in a confirmation proceeding. *See also; Twin Loups*
2 *Reclamation Dist. v. Blessing*, 202 Neb. 513, 276 N.W.2d 185 (1979), (holding a contract
3 between an irrigation district and United States void for violating state law).
4

5 EBID cites *Ivanhoe Irrigation District v. All Parties and Persons*, 53 Cal.2d 692, 350
6 P.2d 69 (1960) to support its argument that the Court's review of the contract is narrow. The
7 confirmation proceedings in *Ivanhoe* were brought pursuant to federal statute only. *Id.* at 72.
8 The federal statute bears little, if any, resemblance to Section 45-7-1957 M.C.A. *See, e.g.*, 43
9 U.S.C. § 423e. Moreover, the *Ivanhoe* Court considered claims regarding the contract's
10 repayment terms; elections processes; changes in irrigation district boundaries; and whether
11 the contract was uncertain and lacked mutuality. *Id.* at 84-93. Therefore, the *Ivanhoe* Court
12 conducted a broad review. Accordingly, *Ivanhoe* does not assist EBID.
13

14 EBID also cites *Nampa & Meridian Irr. Dist. v. Petrie*, 28 Idaho 227, 153 P. 425
15 (1915) in support of its argument. The confirmation proceedings in *Nampa* were brought
16 pursuant to Idaho statute. Idaho's contract confirmation statute bears no resemblance to
17 Section 45-7-1957 M.C.A. *Id.* at 235. Accordingly, *Nampa* is not persuasive.
18

19 As previously noted the Court must examine the validity of the terms of the contract.
20 There is no term the Court may ignore. All terms must be considered and must be considered
21 together. All of the terms together create the contract. Therefore, the Court must determine
22 the validity of the contract.
23

24 The statute requires the Court to consider the validity of the terms of the contract.
25 There is no term the Court may ignore. All terms must be considered and must be considered
26 together. All of the terms together create the contract. Therefore, the Court must determine
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1 the validity of the contract. The validity of a contract is determined by whether the essential
2 elements are present.

3 Moreover, EBID agrees that the Court must determine whether there is a binding and
4 enforceable contract. The Court can not do so without analyzing the essential elements.
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6 Section 28-2-102 M.C.A. enumerates the essential elements.

7 They are

- 8 (1) identifiable parties capable of contracting;
9 (2) their consent;
10 (3) a lawful object; and
11 (4) a sufficient cause or consideration.

12 EBID's argument that a contract maybe both "valid" but also possibly "illegal" is
13 unpersuasive and unsupported.

14 Counterclaim 1

15 "The object of a contract is the thing which it is agreed on the part of the party receiving
16 the consideration to do or not do." Section 28-2-601 M.C.A. The object of the contract under
17 scrutiny is for the United States to supply water for EBID within its boundaries. The object
18 of a contract is illegal if the object is contrary to an express provision of law. Section 28-2-
19 701 MCA.

20 Montana law provides the procedure for an irrigation district to extend its boundaries.
21 Sections 85-7-1808-1810 M.C.A. Open A alleges those procedures were not followed. Open
22 A alleges that EBID's boundaries were illegally extended. Taking Open A's allegations as
23 true the contract illegally provides water to lands outside EBID's boundaries. Therefore,
24 Open has alleged the contract is not valid.
25

26 Moreover, an expansion of EBID boundaries involves proceedings of EBID and its
27 board before contract was made. The Court must examine such proceedings.
28

1 Counterclaim 1 should not be dismissed for failure to state a claim upon which relief
2 can be granted.

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4 Counterclaim 2

5 Open A alleges that the contract allows for the irrigation of additional acres not
6 included in a water use permit. Open A argues that EBID is required to obtain a permit for
7 additional acres from the Department of Natural Resources and Conservation ("DNRC").
8 Whether EBID expanded acreage requires an examination of boundaries. As noted above,
9 this allegation is sufficient to state a claim.

10 The District Court has no jurisdiction over water permits. No such issue should be
11 considered.

12
13 Counterclaim 3

14 Open A alleges that Court approval of the contract is akin to the Court adjudicating
15 water rights. The District Court does not have jurisdiction to adjudicate water rights.
16 Therefore, Open A argues that the Court should not affirm the contract.

17 The Court agrees that it does not have the jurisdiction to adjudicate water rights.
18 Accordingly, Counterclaim 3 should be dismissed for failure to state a claim upon which
19 relief can be granted.

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21 Counterclaim 4

22 Open A's Counterclaim 4 is a reiteration of Counterclaims 1 and 2. Therefore, the
23 Court's analysis regarding Counterclaims 1 and 2 applies to Counterclaim 4. Accordingly,
24 Counterclaim 4 should not be dismissed pursuant to Rule 12(b)(6) M.R.Civ.P.
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1 *Protective Ass'n v. Patterson*, 204 F.3d 1206, 1999 U.S. App. LEXIS 35234 (9th Cir. 1999),
2 *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1989 U.S. App. LEXIS 9977 (9th
3 Cir. 1989). The United States is not a party to this litigation. Furthermore, this proceeding in
4 no way determines the rights and obligations of the United States.
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6 The cases cited by EBID rely upon *United States v. County of Allegheny*, 322 U.S.
7 174, 64 S.Ct. 908 (1944). In *Allegheny* the U.S Supreme Court stated that, "[t]he validity and
8 construction of contracts through which the United States is exercising its constitutional
9 functions, their consequences on the rights and obligations of the parties, the titles or liens
10 which they create or permit, all present questions of federal law". *Id.* at 183. The Supreme
11 Court recently clarified that the rule in *Allegheny* applies only when the United States or an
12 agency of the United States is a party. *See e.g., Empire Health Choice Assur. Inc. v. McVeigh*,
13 126 S.Ct. 2121, 165 L.Ed.2d 131 (2006). The United States is not a party to the suit.
14 *Allegheny* does not apply.
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16 Additionally, jurisdiction exists to resolve a federal question when a well pled
17 complaint establishes that either federal law creates the cause of action or that the plaintiff's
18 right to relief depends on resolution of a substantial question of federal law. *Empire Health* at
19 2131.
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21 Open A challenges EBID's authority to expand its irrigable acres. EBID was formed
22 under the laws of Montana. The extent of EBID's authority is purely a question of state law.
23 Open A's counterclaims do not present any questions of federal law. The counterclaims do
24 not depend on the resolution of a substantial federal question. Accordingly, EBID's argument
25 that federal law controls this action and prevents this court from obtaining jurisdiction is
26 unpersuasive.
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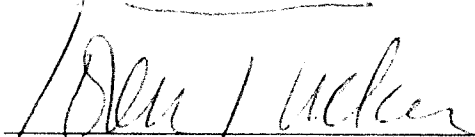
1 EBID also argues that Open A's counterclaims attempt to adjudicate water rights.
2 Therefore, EBID argues that the Court lacks jurisdiction. The Court agrees that it does not
3 have jurisdiction to adjudicate water rights. Section 3-7-501 M.C.A. However, the Court can
4 not presently determine that Open A's counterclaims will necessarily involve the
5 adjudication of water rights. Therefore, the EBID argument regarding the adjudication of
6 water rights is not persuasive.
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8 EBID's motion to dismiss for lack of subject matter jurisdiction should be denied.

9 NOW THEREFORE, IT IS HEREBY ORDERED that:

- 10 1.) Open A's Counterclaims 3 and 6 are dismissed.
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12 2.) EBID's motion to dismiss Open A's Counterclaims 1, 2, 4 and 5 is denied.
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14 3.) The Clerk of Court will please file this Order and distribute a copy to all parties.

15 Dated: April 26, 2007.

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17 
LOREN TUCKER
18 District Judge
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22 CLERK OF COURT'S CERTIFICATE OF SERVICE

23 This is to certify that the within document was
24 duly served on all parties listed below, by
25 U.S. Mail, personal delivery or attorney's mailbox
26 within the Clerk of Court's office,

27 this 26 day of April, 20 07.

28 
Clerk of District Court

William A. Hritsco
Michael J. L. Cusick
Hertha L. Lund